Supreme Court, U.S.
FILED

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In the

Supreme Court of the United States

October Term, 1997

DICKIE BOUYE and WILLIAM BOUYE,
Petitioners,

v.

STATE OF SOUTH CAROLINA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SOUTH CAROLINA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 16-15-365 of the South Carolina Code, which prohibits "lewd and lascivious conduct" is unconstitutionally overbroad where "lewd and lascivious" is deemed anything which causes sexual arousal and there are no protections for expression protected by the First Amendment of the United States Constitution?

PARTIES TO THE PROCEEDING

The Petitioner and the State of South Carolina, represented by the South Carolina Office of the Attorney General are the only parties to this proceeding. Through the involvement of the South Carolina Office of the Attorney General, South Carolina requirements of notification when challenging the constitutionality of a state statute have been satisfied.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

Petitioners Dickie Bouye and William Bouye ask that a writ of certiorari issue to review the decision of the South Carolina Supreme Court on February 18, 1997. A timely Petition for rehearing was denied on March 20, 1997.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court is reported at 484 S.E.2d 461 (S.C. 1997) and is annexed to this petition as Appendix A. The Petition for Rehearing was denied by unpublished form letter and is attached as Appendix B.

JURISDICTION

Petitioners invoke this Court's jurisdiction under 28 U.S.C. Section 1257(a). The highest Court in South Carolina has ruled in this case regarding the validity of a state statute which Petitioners contend is unconstitutional.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law....abridging the freedom of speech...

STATEMENT OF THE CASE

Dickie Bouye and William Bouye were charged and convicted of violating S.C. Code Section 16-15-365 prohibiting "lewd and lascivious" exposure of bodily parts by virtue of their managerial/ownership interests in a topless bar. The dancers were not charged. Petitioners asserted at all times prior to being convicted, and on appeal, that S.C. Code of Laws Section 16-15-365 is patently overbroad both as written and as applied.

S.C. Code Section 16-15-365 reads as follows:

> *Any person who willfully and knowingly exposes the private parts of his person in a lewd and lascivious manner and in the presence of any other person, or aids or abets any such act, or who procures another to perform such act, or any person, who as owner, manager, lessee, director, promoter, or agent, or in any other capacity knowingly hires, leases, or permits the land, building, or premises of which he is owner, lessee, or tenant, or over which he has control, to be used for purposes of any such act, is guilty of a misdemeanor and, upon conviction, must be*

imprisoned for not more than six months or fined not more than five hundred dollars, or both.

Since Petitioners are the manager and owner of a topless establishment, they were basically charged with aiding and abetting lewd conduct. Prior to their arrests, the Sheriff of Spartanburg County rounded up all the owners of topless clubs and told them they were in violation of this Statute (Supreme Court Record, hereinafter "R." p. 224). When club owners asked how to remedy their conduct and remove it from the above all-inclusive statute, the Sheriff told them to ask their lawyers, close their establishments or put clothes on the girls (R. p. 211).

After this meeting, Petitioners and other club owners were arrested. Petitioner Dickie Bouye was found guilty of two violations of the Statute and Petitioner William Bouye was found guilty of one violation. The State presented no testimony placing either Petitioner inside the club at the time these alleged "lewd" performances occurred. Appellants presented testimony of the standards in the industry, the house rules of their establishment and the disciplinary process which occurs for infractions.

Petitioners initially raised the issue of the Statute being unconstitutional via a motion to dismiss. Petitioners renewed the issue in requesting a directed verdict. The trial court refused to rule on either Motion until immediately prior to charging the jury, whereby the judge found the statute constitutional (R. p. 234). While Petitioners requested that the definition of "lewd and lascivious" be narrowed to comply with federal precedent (R. p. 24), the Court refused.

After the court charged the jury, Petitioners renewed their Motions regarding overbreadth and unconstitutionality (R. p. 256) and following the verdict motioned for a new trial and directed verdict on these same grounds (R. p. 258). On appeal, the Supreme Court of South Carolina upheld the trial judge's finding that the above statute was not overbroad and was constitutional. Unlike other states, South Carolina has not judicially construed the above Statute to protect speech covered under the First Amendment of the United States Constitution.

REASONS FOR GRANTING THE WRIT

I.

The South Carolina Supreme Court has decided an important and recurrent issue of First Amendment federal law in a manner which conflicts with decisions by the Highest Courts of sister states and prior federal rulings.

Section 16-15-365 operates to ban any conduct deemed "lewd and lascivious" regardless of literary, artistic or overriding constitutional protections. The common[1] definitions of "lewd" in South Carolina means "vulgar, indecent, tending to arouse sexual desire or imagination and lacking moral discipline or sexual restraint" (R. p. 248). "Lascivious" is defined as "lustful or tending to invite lust or tending to deprave the morals in respect to sexual relations"(R. p. 248). Under South Carolina law, words are to be given their "common meaning" where not specifically defined. *State v. Hardee* 279 S.C. 409, 308 S.C. 2d 521 (S.C. 1983); *City of Columbia v. Martha Deese* 280 S.C. 135, 311 S.E.2d 920 (S.C. 1983)[2]. However, by simply outlawing anything that causes "sexual arousal", South Carolina has effectively ignored First Amendment protections and ruled in a manner completely contrary to similar cases decided by sister states or by Federal Courts.

In *Barnes v. Glen Theatre, Inc.* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) this Court, while finding Indiana's public indecency law constitutional, reaffirmed that nude (not even topless-as in the case sub judice) dancing was expressive conduct marginally within the outer perimeters of the First Amendment. Considering an argument similar to Petitioners, the Sixth Circuit Court of Appeals struck down Akron's public indecency Ordinance in *Triplett Grille, Inc. v. City of Akron* 40 F.3d 129 (CA6 1994). In doing so, the Court did an analysis of current federal law regarding overbreadth and concluded that since the Ordinance at issue prohibited all public nudity "including live performances with serious literary, artistic, or political value" it was unconstitutional as overbroad. *Id.* at p. 135. Additionally, the Court noted:

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[1] Dictionary definition

[2] South Carolina Supreme Court held that the term "lewd" should be given its "plain and ordinary meaning" and was not overbroad.

> The Ordinance makes no attempt to regulate only those expressive activities associated with harmful secondary effects and includes no limiting provisions. Instead, Akron's wide ban on public nudity sweeps within its ambit expressive conduct not generally associated with prostitution, sexual assault, or other crimes. *Id.*

Like the Akron Ordinance, South Carolina's statute, simply read verbatim and given the common definitions of "lewd" and "lascivious", outlaws the following conduct:

(a) sexual relations between ANY two people, including husband and wife. The statute does not exclude private places or personal relations which are afforded privacy protections under the United States Constitution. Under this Statute, any landlord or person renting, leasing or permitting their property to be used for this "lewd" act would also be guilty;

(b) theatrical performances, television programs, videotapes, Internet clips, and other non-live productions which contain nudity which causes sexual arousal, regardless of its literary or artistic merit. Under the Statute, any person aiding or abetting, renting, promoting, directing or managing any such production or performance are also guilty.[3]

(c) nudes posing for pictures or art, as long as they are deemed sexually arousing;

(d) Michelangelo's famed statute "David"-if it causes arousal in the jurors or stimulates sexual imagination.

Petitioners assert that South Carolina's law is overbroad and vague and flies in the face of other federal and state decisions.

Numerous other Courts have struck down as overbroad statutes or ordinances which attempt to eliminate topless or nude dancing, but effectively prohibit other conduct undoubtedly protected by the Constitution. *See: Erznoznik v. City of Jacksonville* 422 U.S. 205 (1975); *Salem Inn, Inc. v. Frank* 381 F. Supp. 859 (1974)-which struck

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[3] Although South Carolina has a perfectly valid obscenity Statute which does contain constitutional safeguards, the "lewd and lascivious" statute makes the Obscenity Statute meaningless by outlawing anything causing sexual arousal without concern for any constitutional protections which are violated.

down ordinance meant for topless dancing but in essence could be applied to communicative dancing that involved nudity, such as "Hair".

Additionally, other cases have held that in similar circumstances and as applied to nudity in live contexts, punishment based on general "lewd and lascivious" behavior was unconstitutional where there is no imposition of the lewd or lascivious behavior on an unwilling person. *See: PBIC v. Byrne* 313 F. Supp. 757 (D. Mass. 1970); *Southeastern Promotions, Ltd. v. Atlanta* 334 F. Supp. 634 (N.D. Ga. 1971).

Further, the highest state courts of Utah, California, Michigan, District of Columbia, Alaska, New Mexico, Massachusetts and Pennsylvania, in considering similar legislation regarding "lewd" conduct, has judicially limited such legislation to comport with constitutional safeguards[4]. In *District of Columbia v. Garcia* 335 A.2d 217 (D.C. 1975) cert. den. 423 U.S. 894, 96 S.Ct 192, 42 L.Ed. 2d 125, this Court denied cert. where the Court of Appeals construed a law involving "lewd" conduct to only prohibit proposals to commit sodomy, indecent exposure or sexual proposals to children.

There is unquestionably an important federal issue at stake—whether citizens of South Carolina are entitled to the constitutional safeguards of free speech protection that Federal Courts have served the vanguard of. While citizens of other sister states have been spared this "mushroom cloud" prohibition on nudity causing arousal, South Carolinians may face jail time for exercising rights protected by the First Amendment. Under these circumstances, Petitioners beseech the intervention of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[4] *See: In the Interest of L.G.W.* 641 P. 2d 127 (Utah 1982); *Pryor v. Municipal Court for Los Angeles* 599 P.2d 636, 647, 25 Cal. 3d 238 (Ca. 1979); *State v. Morley* 317 P.2d 317, 63 N.M. 267 (NM 1957); *City of Revere v. Alfonso Aucella* 338 N.E.2d 816, 369 Mass. 138 (MA 1975); *Commonwealth v. Sefranka* 414 N.e.2d 602, 382 Mass. 108 (MA 1980); *Pennsylvania v. McDonald* 347 A.2d 290, 464 Pa. 435 (1975).

Respectfully Submitted,

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June 18, 1997

APPENDIX A

Opinion of the
South Carolina Supreme Court
484 S.E. 2d 461

State of South Carolina, Respondent

v.

Dickey Bouye and William Bouye, Appellants.

Appeal From Spartanburg County
J. Derham Cole, Judge

Opinion No. 24577
Heard December 4, 1996 - Filed February 18, 1997

AFFIRMED

Suzanne E. Coe, of Arnold & Coe, L.L.P., of Greenville, for the appellants.

Charles Molony Condon, Attorney General, John W. McIntosh, Deputy Attorney General, Salley W. Elliott, Assistant Attorney General, all of Columbia, and Holman C.Gossett, Jr., Solicitor, Seventh Judicial Circuit, of Spartanburg, for respondent.

WALLER, A.J.: Appellants Dickey and William Bouye were convicted of violating S.C. Code Ann. Sec. 16-15-365 (Supp. 1995), a statute which generally prohibits certain "lewd and lascivious" behavior.[1] Their

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[1] Section 16-15-365 provides:

> Any person who willfully and knowingly exposes the private parts of his person in a lewd and lascivious manner and in the presence of any other person, or aids or abets any such act, or who procures another to perform such act, or any person, who as owner, manager, lessee, director, promoter, or agent, or in any other capacity knowingly hires, leases or permits the land,

convictions were based on the conduct of dancers in the Gold Nugget, a topless dancing establishment owned by Dickey and managed by William. They have appealed, arguing the statute is unconstitutionally overbroad. We disagree and affirm.

FACTS

Between November 1994 and July 1995, undercover police officers with the Spartanburg County Sheriff's Department visited the Gold Nugget posing as patrons. They wore an eight- millimeter camera concealed under their shirts which recorded everything in front of them. Following is a brief summary of the conduct they observed from the paid dancers.

Various female dancers, while wearing only a G-string, would perform dance routines on a stage in front of customers. The dancers were observed repeatedly having physical contact with the customers. This physical contact included one or more dancers (1) rubbing their bottoms over men's crotches while performing private dances off-stage; (2) putting their faces toward men's crotches and dancing against them; (3) touching a customer's head with bare breasts; (4) sitting in a customer's lap "in a kind of rotating manner" before standing back up; (5) removing a man's glasses and ;lacing them in her G-string; and (6) grabbing a man by the collar and pushing him toward her bare breasts. One officer testified that while receiving a private dance the dancer "sat straddle me and pushed my shoulders back with her hands to where she was, I guess grinding her pelvic area against my stomach and my groin. She also in the course of that dance while she was leaning forward. . . rubbed one of her nipples across my lips." Another testifies that "one female put a leg on each one of my shoulders and was moving her vagina in a rotating manner right in front of my face." While dancing the

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building, or premises of which he is owner, lessee, or tenant, or over which he has control, to be used for purposes of any such act, is guilty of a misdemeanor and, upon conviction, must be imprisoned for not more than six months or fined not more than five hundred dollars or both.

dancers rubbed their breasts, put their hands on their shoulders and pushed their breasts in customer's faces, and made motions toward customers with their genital areas.

Following these observations, Appellants were charged with and subsequently convicted of violating section 16-15-365.

DISCUSSION

Appellants argue the statute under which they were convicted violates Due Process because it prohibits constitutionally protected speech and is thus overbroad. Initially, we point out that Appellants have conceded that the conduct of the dancers in this case is not constitutionally-protected.[2] They are arguing that the statute is facially overbroad because it can be applied to other conduct not extant in this case that is constitutionally protected.[3] "When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and not statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution." "Home Health Serv., Inc. v. S.C. Tax Comm'n, 312 S.C. 324, 440 S.E. 2d

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[2]See, e.g., Hang On, Inc. v. City of Arlington, 65 F.3d 1248 (5th Cir.1995) (statute prohibiting touching between customer and dancer not overbroad because touching is not protected at all by the First Amendment); Hoskins v. Dept. of Business Regulation, 592 So. 2d 1145 (Fla. Dist. Ct. App.), reviewed denied, 601 So. 2d 552 (Fla. 1992) (lap dancing not protected activity); State v. Private Dancer, 613 N.E. 2d 1066 (Ohio Ct. App. 1992) (lap dancing not protected expression under First Amendment).

[3] Normally, we would question whether Appellants had standing to make this argument. However, in the context of an overbreadth argument, courts have recognized an exception to the rules of standing. See SBC Enterprises, Inc. v. City of South Burlington, 892 F. Supp. 578, 583-84 (D. Vt. 1995) ("The concern is that an overbroad law may threaten others not before the court - those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.") (internal quotations omitted).

375 (1994). Appellants have the burden of proving the statute unconstitutional. Id.

"[T]he overbreadth doctrine applies only to First Amendment cases where the challenged law would have a "chilling effect" on constitutionally protected forms of speech." State v. Tenth Dist. Court of Appeals, 588 N. E. 2d 116 (Ohio 1992). See also City of Portland v. Jacobsky, 496 A.2d 646 (Me. 1985) (statute is overbreadth when its language is not only forbids conduct constitutionally subject to proscription but is so broad that it ensnares protected conduct as well). The overbreadth doctrine is considered on of last resort and should be used sparingly, "especially where the statute in question is primarily meant to regulate conduct and not merely pure speech." Schmitt v. State, 590 So. 2d 404,412 (Fla. 1991), cert. denied, 503 U.S. 964 (1992). Thus, the threshold issue is whether the statute in question prohibits constitutionally protected speech. We hold that it does not.

The statute prohibits conduct, not speech. Nonetheless, expressive conduct, or "symbolic speech," is entitled to some First Amendment protection under certain circumstances. See United States v. O'Brien, 311 S.C. 555, 559,430 S.E. 2d 511,514 (1993) ("Conduct may be sufficiently inbued with elements of communication so as to fall within the scope of the First Amendment"). Even assuming that this statute does address certain expressive conduct, we construe the language of this statute as a prohibition of obscenity. It is well-settled that obscene speech is not protected by the First Amendment. See Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973); Roth v. United States, 354 U.S. 476 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957). As we stated in Ramsey, "[a] statute directed at conduct rather than speech may stand; and a statute reaching a proscribable class of speech. . . does not infringe on First Amendment rights." 311 S.C. at 560, 430 S. E. 2d at 514 (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992)).

This interpretation is abundantly supported. Initially, the dictionary definitions of "lewd," "lascivious," and "obscene" show that these terms are all synonyms. See American Heritage Dictionary at 726, 715, 858 (2nd ed. 1982) (respectively defining lewd in part as obscene; lascivious in part as lewd; and obscene in part as lewd); Black's Law Dictionary at 882, 907 (respectively defining lascivious in part as lewd and obscene; and lewd in part as obscene and lascivious). Furthermore, many other courts, including the Supreme Court, have used these terms interchangeably and found them to be synonymous.

> There are certain well defined and narrowly limited classes of speech, the prevention of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . . *It has been well observed that such utterances are no essential part of any exposition of ideas, and are such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .*

Roth, 354 U.S. at 485, 77 S. Ct. at 1309, 1 L. Ed. 2d at 1507. See also Trans Lux Corp. v. State, 366 So. 2d 710 (Ala. 1979); People v. Sarong Gals, 103 Cal. Rptr. 414, 417 (Cal. Ct. App. 1972) ("It is true that nude dancing is . . . protected by the First Amendment. From this fact, the defendants make the illogical leap to the conclusion that *lewd*, nude entertainment ("dancing") receives the same protection. Hardly. Lewdness is lewdness and covering it with a patina of "free expression" is a fiction which the law will not tolerate."); Stall v. State, 570 So. 2d 257 (Fla. 1990), cert. denied sub nom. Long v. Florida, 501 U.S. 1250 (1991); State v. Waller, 621 So. 2d 499 (Fla. Dist. Ct. App. 1993) (requiring analysis of whether conduct is lewd to be decided by resort to the three prong obscenity test established in Miller, 413 U.S. at 15, 93 S. Ct. at 2607, 37 L. Ed. 2d at 419); State v. Crater, 388 So. 2d 802 (La.

1980); 400 East Baltimore St., Inc. v. State, 431 A. 2d 682 (Md. Ct. Spec. App. 1981), cert. denied, 455 U. S. 940 (1982); Blau-Par Corp. v. New York State Liquor Auth., 482 N.Y.S. 2d 841 (N.Y. App. Div. 1984) (prohibition of lewd conduct not violate of fee expression because such conduct maust necessarily be obscene and is thus not constitutionally protected).

In Vernon Beigay, Inc. v. Traxler, 790 F.2d 1088 (4th Cir. 1986), the Fourth Circuit was called upon to decide that constitutionality of South Carolina's obscenity statutes.[4] The statute defined obscenity in part as one which appealed to the "prurient interest in sex." "Prurient interest" was defined as a "shameful or morbid interest in nudity, sex, or excretion and is reflective of an arousal of lewd and lascivious desires and thoughts." (emphasis added). Appellant argued this emphasized language rendered the statute overbroad "because materials that should be protected by the Constitution will be considered obscene under this definition of prurient interest." Id. at 1094. Thus, because this statute regulates obscenity,[5] we find it does not prohibit constitutionally protected speech.

Appellants also argue that statute is overbroad because it is not limited to exposure in public places and therefore could be used to prosecute people for conduct in the privacy of their homes. Clearly, without such a limitation, the statute will be overbroad because it infringes on the constitutionally protected right to privacy. See e.g., Attwood v. Purcell, 402 F. Supp. 231 (D. Ariz. 1975). "A statute should not be deemed facially invalid unless it is not readily subject to a narrowing

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[4] The obscenity statutes the court judged were sections 16-15-260 to -440, which have been replaced with sections 16-15-305 to -445 (Supp. 1995). However, the language referred to in the text is identical in both statutes. In Traxler, the Fourth Circuit struck down the former statute as overbroad for reasons unrelated to the present discussion.

[5] Obscenity is statutorily defined. See S.C. Code Ann. Sec. 16-15-305 (B) Supp. 1995) defining obscenity "for the purposes of this article," which would include the current statute).

construction." Gravely v. Bacon, 429 S.E. 2d 663, 666 (Ga. 1993). Furthermore, in a facial statutory challenge, the overbreadth complained of must be real and substantial when judged in light of the statute's "plainly legitimate sweep." State v. Hunter, 550 N.W. 2d 460, 464 (Iowa 1996). A party will prevail no a facial attack only by showing there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." Triplett Grille, Inc. v. City of Akron, 40 F.3d 129, 135 (6th Cir. 1994). Here, there is not realistic danger that this statute will be applied to people in the privacy of their own homes. Furthermore, while the statute does not directly limit its reach to public conduct, we find that from the language used (extending prohibition to person who "aids or abets any such act, or who procures another to perform such act, or any person, who as owner, manager, lessee, director, promoter, or agent, or in any other capacity" knowingly allows his or her premises to be used for the purposes of such an act) the legislature clearly intended such a limitation.

We find that Appellants have not met their burden of proving section 16-15-365 of the South Carolina Code unconstitutional.[6] Accordingly, their convictions are hereby

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[6] We summarily reject Appellant's further argument that the statue is unconstitutional as applied to them. Appellants seem to be basing this claim on their argument that the record contains no evidence they were aware that offensive conduct was being performed by the dancers. In other words, appellants are arguing they did not engage in conduct proscribed by the statute. Initially, we do not see how this shows unconstitutional application of the statute. Normally, an "unconstitutional as applied" argument in the First Amendment context rests on the assumption that the conduct engaged in would be prohibited by the statute; however, constitutional right held by the actor. See, e.g, State v. Perkins, 306 S.C. 353, 412 S.E. 2d 385 (1991) (disorderly conduct statute was unconstitutionally applied to defendant not because he did not engage in conduct prohibited by the statute but because his conduct was protected by the First

AFFIRMED.

FINNEY, C.J., TOAL, MOORE AND BURNETT, JJ., concur.

Amendment); City of Columbia v. Brown, 316 S.C. 432,450 S.E. 2d 117 (Ct. App. 1994). Even if they were not the ones actively engaging in the prohibited conduct, Appellants clearly have not constitutionally protected right to procure or knowingly permit other to perform illegal conduct on premises they own or control. In any event, we find the record contains sufficient evidence to support Appellants' convictions under the statute.

APPENDIX B
The Supreme Court of South Carolina

CYDE N. DAVIS,JR.
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P.O. Box 11330
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March 20, 1997

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Re: The State v. Bouye, Dickey and William

Dear Ms. Coe:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ Ernest A. Finney, Jr. C.J.

s/ Jean H. Toal A.J.

s/ James E. Moore A.J.

s/ John H. Waller A.J.

s/ E.C. Burnett, III A.J.

March 20, 1997."

The remittitur in this matter is today being forwarded to the Clerk of Court of Spartanburg County.

Very truly yours,
CLERK

CND, Jr./adm
cc: Assistant Deputy Attorney General Salley W. Elliott

Supreme Court, U.S.
FILED
AUG 22 1997
CLERK

No. 96-2021

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

Dickie Bouye and William Bouye,

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State of South Carolina,

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On Petition for Writ of Certiorari
To the South Carolina Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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30 pp

PETITIONERS' QUESTION PRESENTED

Whether Section 16-15-365 of the South Carolina Code, which prohibits "lewd and lascivious conduct" is unconstitutionally overbroad where "lewd and lascivious" is deemed anything which causes sexual arousal and there are no protections for expression protected by the First Amendment of the United States Constitution?

RESPONDENT'S COUNTER-QUESTION PRESENTED

Should Certiorari be denied because the specific constitutional challenge raised by Petitioners is merged with issues which were not preserved in the lower court and because Petitioners have ignored the limiting construction given the statute under challenge which construction effectively renders moot Petitioners' claims that the statute is overbroad as outlawing all nudity which causes sexual arousal?

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No. 96-2021

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

Dickie Bouye and William Bouye,

Petitioners,

vs.

State of South Carolina,

Respondent.

On Petition for Writ of Certiorari
To the South Carolina Supreme Court

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Respondent, State of South Carolina, prays that the Petition to review the judgment of the South Carolina Supreme Court in the above-styled case be denied and dismissed.

CITATION TO OPINION BELOW

The February 1997 opinion of the South Carolina Supreme Court is reported

at ___ S.C. ___, 484 S.E.2d 461 (1997), and is reproduced in the Petition at Appendix A. The Order of the South Carolina Supreme Court denying rehearing is dated March 20, 1997 and is unreported. The Order is reproduced as Appendix B to the Petition.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on February 18, 1997, and this Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following:

(1) Fourteenth Amendment to the United States Constitution which provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state

> deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(2) The First Amendment to the United States Constitution which provides in relevant part:

> Congress shall make no law...abridging the freedom of speech...

(3) South Carolina Code Ann. § 16-15-365 which provides

> Any person who wilfully and knowingly exposes the private parts of his person in a lewd and lascivious manner and in the presence of any other person, or aids or abets any such act, or who procures another to perform such act, or any person, who as owner, manager, lessee, director, promotor, or agent, or in any other capacity knowingly

> hires, leases or permits the land, building, or premises of which he is owner, lessee, or tenant, or over which he has control, to be used for purposes of any such act, is guilty of a misdemeanor...

RESPONDENT'S COUNTERSTATEMENT OF THE CASE

I. Procedural History

Petitioners, as owners or managers, were indicted at the July 1995 term of the Court of General Sessions for Spartanburg County, South Carolina, for knowingly permitting the use of their premises for the knowing exposure of private parts by females working there in a lewd and lascivious manner and in the presence of others. Petitioners proceeded to trial October 16-18, 1995, before the Honorable J. Derham Cole, Judge, and a jury. Dickie Bouye was found guilty of two of the three counts charged and William Bouye was

acquitted of one charge and convicted of a second.

Petitioners served and filed notice of intent to appeal and following full briefing and oral argument, the South Carolina Supreme Court affirmed the convictions and sentences. State v. Bouye, ___ S.C. ___, 484 S.E.2d 461 (1997). Petitioners moved before the South Carolina Supreme Court for Rehearing which was denied on March 20, 1997.

II. Statement of Relevant Facts

For the purpose of this Brief in Opposition, Respondent incorporates herein the recitation of relevant facts from the opinion below.

HOW THE QUESTION WAS RAISED BELOW

At trial and prior to the taking of testimony, Petitioners moved to dismiss the charges on the ground that South Carolina Code Ann. § 16-15-365, the statute with which they were charged

conflicted with Barnes v. Glen Theatre, Inc., 501 U.S. 560, 115 L.Ed.2d 504, 111 S.Ct. 2456 (1991) and Triplett Grille, Inc. v. City of Akron, 40 F.3d 129 (6th Cir. 1994) on the ground that the statute prohibits nudity in violation of the First Amendment. Petitioners argued that the terms "lewd" and "lascivious" are not defined and that § 16-15-365 is overbroad. Petitioners asserted that the statute could be applied to sexual relations between husband and wife in the privacy of the home. (R. p. 6, line 18 - p. 12, line 14; p. 15, line 22 - p. 16, line 12; p. 17, line 10; p. 23, line 15 - p. 24, line 20). Petitioners conceded that obscene dancing or lewd and lascivious dancing is not protected by the First Amendment but contended that the statute was not drawn narrowly enough. (R. p. 60, line 1 - p. 1, line 11). When the State rested its case and at the close of evidence,

Petitioners renewed the motion to dismiss on the ground that the statute is facially invalid as overbroad in that it had the effect of deterring protected speech. Petitioners argued that the statute prohibited any and all nudity; private and public. (R. p. 145, line 23 - p. 149, line 2; p. 233, lines 2-25). The trial court denied Petitioners' motion to dismiss, finding that the cases upon which Petitioners relied were distinguishable. (R. p. 234, line 15 - p. 235, line 2). Petitioners indicated they might also challenge the statute on the ground of vagueness depending on the jury charge the trial court would later give. (R. p. 235, lines 9-17). The trial court charged the jury as follows:

> Lewd means vulgar, indecent, tending to arouse sexual desire or imagination and lacking moral discipline or sexual restraint. Lascivious is defined

> as lustful or tending to incite lust or tending to deprave the morals in respect to sexual relations.

(R. p. 248, lines 8-12. See also p. 236, lines 8-18. See also R. p. 255, lines 13-17). Petitioners did not object to this jury charge regarding the terms "lewd" and "lascivious". Petitioners never challenged the statute on the ground of vagueness. (R. p. 252, line 10 - p. 258, line 25).

Petitioners, on appeal to the South Carolina Supreme Court, asserted that § 16-15-365 of the South Carolina Code of Laws, was unconstitutionally overbroad on its face and as applied in their case so as to draw within its ambit speech and expression which is constitutionally protected, including all topless dancing. (See Final Brief of Appellants).

The South Carolina Supreme Court in its February 18, 1997, opinion first noted

out that Petitioners conceded during argument that the conduct of the topless dancers in question in their case was obscene and not constitutionally protected. The Supreme Court thereafter addressed Petitioner's claim that the statute is facially overbroad because it can be applied to other constitutionally protected conduct not involved in Petitioners' case. The South Carolina Supreme Court opined that the statute prohibited conduct and not speech and construed the legislative intent from language of the statute and related statutes as well as from prior judicial decisions as a prohibition of obscenity. The court noted that obscenity is specifically statutorily defined and that the definition as codified applies to § 16-15-365. See footnote 5, State v. Bouye, supra. The court also, through statutory construction, limited the reach

of § 16-15-365 to public conduct. The court, in a footnote, summarily rejected Petitioners' argument that the statute is unconstitutional as applied to them on Petitioners claim that the record contained no evidence they were aware that the offensive conduct was being performed. The Court concluded that Petitioners had no constitutionally protected right to procure or knowingly permit others to perform illegal conduct on their premises and, alternatively, that there was sufficient evidence in the record to support Petitioner's conviction. State v. Bouye, supra.

REASONS FOR DENYING THE WRIT

Should Certiorari be denied because the specific constitutional challenge raised by Petitioners is merged with issues which were not preserved in the lower court and because Petitioners have ignored the limiting construction given the statute under challenge which construction effectively renders moot Petitioners' claims that the statute is overbroad as outlawing all nudity which causes sexual arousal?

Petitioners claim that § 16-15-365 read verbatim and giving common dictionary definitions to the terms "lewd" and "lascivious" is unconstitutionally vague; is unconstitutionally overbroad in that it outlaws anything which causes sexual arousal and operates to ban any conduct deemed lewd and lascivious regardless of literary, artistic or overriding constitutional protections; and conflicts with similar cases decided by state and federal courts. Respondent asserts that the petition should be declined because the specific constitutional challenge raised in the Petition for Certiorari is merged with issues not preserved in the lower court and because it is clear from a reading of the argument in the Petition that Petitioners have misapprehended the opinion below. Petitioners fail to recognize the limiting construction provided the statute in question by the

state court and which effectively moots Petitioners' claims that the statute outlaws all nudity in the state which causes sexual arousal.

Specifically, to the extent that Petitioners now argue that the statute in question is unconstitutionally vague and to the extent Petitioners offer specific common dictionary definitions of the terms "lewd" and "lascivious" as contributing to the alleged constitutional infirmity, then this appeal contains a jurisdictional defect. Claims concerning vagueness and the dictionary definitions offered by Petitioners are not properly before this Court. Neither claim was preserved at trial by way of objection or motion. In fact, the definitions of lewd and lascivious which Petitioners now characterize as common dictionary definitions were those charged to Petitioners' jury and to which Petitioners

acceded at trial. Under state procedural law, Petitioners are absolutely precluded from arguing on appeal to the South Carolina Supreme Court a matter which was not preserved by way of contemporaneous objection or motion at trial. State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995); State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989). Petitioners made no reference on appeal in the South Carolina Supreme Court to these matters they now raise. Petitioners' failure to preserve these matters in the lower court and Petitioners' manner of merging or jumbling these unpreserved arguments with the issue which was properly preserved below should lead this Court to decline consideration of the challenges as presented to this Court were not made to, fully considered by or fully litigated in the state trial and appellate courts. Therefore, Respondent submits that certiorari should

be denied for the initial reason that Petitioners' manner of presenting his argument to this Court has deprived this Court of jurisdiction by arguing together both preserved and unpreserved issues. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed 2d 527 (1988); Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed.2d 517 (1952). The better approach would be to allow the state courts the opportunity to reach a decision regarding the constitutionality of the statute after first having been fully presented with and ruling on all of the challenges. Other cases are likely to follow this case of first impression for the South Carolina courts regarding § 16-15-365 and may result in a more thorough preservation and delineation of the issue.

Alternatively, as to the merits of Petitioners' facial overbreadth argument

which was preserved below, Respondent submits that Petitioners completely ignore the South Carolina Supreme Court decision in this case which reviewed the history and language of § 16-15-365 and other statutes in the article, reviewed prior judicial decisions and employed rules of statutory construction to authoritatively construe the terms "lewd" and "lascivious" to mean obscene. The state Supreme Court also construed § 16-15-365 as limited in application to knowing, public conduct; and defined "obscene" for purposes of Section 16-15-365 in the same manner as this Court defined the term Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973), and which was codified by the South Carolina legislature for statutes appearing in the article in which 16-15-365 falls. The terms "lewd" and "lascivious" were not defined by the legislature or by the South Carolina

Supreme Court opinion in this case in the manner Petitioners suggest. Quite the contrary, lewd and lascivious was equated with obscene as authoritatively and specifically defined in this State in accordance with the standard or test enunciated in Miller. The statute in question has been construed by the South Carolina Supreme Court as prohibiting the obscene, knowing, public display of private parts. This Court has repeatedly held that the protection of the First Amendment does not extend to obscene speech. Miller v. California, supra; See Reno v. ACLU, ___ U.S. ___, ___ L.Ed.2d ___, 117 S.Ct. 2329 (1997); Sable Communications v. FCC, 492 U.S. 115, 106 L.Ed.2d 93, 109 S.Ct. 2829 (1989); Paris Adult Theater I v. Slaton, 413 U.S. 49, 37 L.Ed.2d 93, 109 S.Ct. 2628 (1973). Therefore, the reach of the statute in question cannot be overbroad as sweeping

within its ambit speech which is constitutionally protected. Contrary to Petitioners' claim, the statute, as interpreted by the state Supreme Court is consistent with this decisions of this Court and with similar cases decided by other state and federal courts. Petitioners' assertion that the statute is overbroad in that it operates to ban any and all nudity is simply untrue and unsupported by a reading of the statute in question and the South Carolina opinion construing it. The statute, as construed, proscribes the knowing, obscene, public display of private parts. There is no total ban of public nudity or nude dancing as Petitioners claim.

Petitioners offer neither real nor substantial infringements of First Amendment protected speech in light of the construction or interpretation provided by the South Carolina Supreme Court. The

statute, as construed, sufficiently defines that which is prohibited and is limited in application to knowing, public exposure of private parts in a manner which taken as a whole appeals to the prurient interest in sex; portrays in a patently offensive way, sexual conduct specifically defined by State law; taken as a whole lacks serious literary, artistic, political, or scientific value; and is not otherwise protected by the Constitutions of the United States or of South Carolina. See South Carolina Code Ann. § 16-15-305 which provides the definition of "obscene" for the article in which 16-15-365 falls. Contrary to Petitioners' argument in the Petition, the statute as construed would not apply to private sexual relations or to any landlord leasing or renting property to individuals who engage in private sexual relations because public conduct is

required along with scienter on the part of the landlord. Contrary to Petitioners' argument, the statute, as construed, would not outlaw nude posing for pictures or art, the display of art, or theatrical performances, television programs, videotapes or non-live productions which contain nudity unless serious literary, artistic, political or scientific value was absent and the other prongs of the obscenity standard were met rendering the performance or production obscene and then not subject to First Amendment protection.

Further, in light of the construction or interpretation provided by the South Carolina Supreme Court, the statute in question and the decision construing it are in accord with the decisions of this Court as well as state and federal courts which Petitioners attempt to offer as conflicting. The decisions offered by Petitioners as conflicting do not involve

obscenity and are not applicable. Nevertheless, even assuming arguendo this Court's decision in Barnes v. Glen Theatre, Inc., 501 U.S. 560, 115 L.Ed.2d 504, 111 S.Ct. 2456 (1991) and the Sixth Circuit Court of Appeals decision in Triplett Grille, Inc. v. City of Akron, 40 F.3d 129 (6th Cir. 1994) were applicable, this statute does not conflict with either. The statute and opinion construing it are consistent with this Court's decision in Barnes. The statute in question, just as in Barnes furthers the interest of South Carolina in protecting societal order and morality as well as protection from secondary effects of adult establishments. Paris Adult Theater I v. Slaton, 413 U.S. 49, 37 L.Ed.2d 446, 93 S.Ct. 2628 (1973). The statute in question, as construed by the State Supreme Court, reflects the moral disapproval in this State of individuals

publicly exposing private body parts in an obscene manner. As in Indiana, South Carolina does not record legislative history but the purpose of protecting societal order and morality as well as combating the secondary effects of adult entertainment is clear from the text of the statute and legislative history regulating morality and decency in this State. This statute is consistent with other laws enacted in this State and in other states which proscribe public indecency and obscenity, See South Carolina Code § 16-15-10, et seq. See particularly, 16-15-90 (Prostitution, lewdness); 16-15-130 (Indecent exposure); 16-15-140 (Committing/attempting lewd act upon child); 16-15-250 (Communicating obscene message to women). This Court has recognized that the police power of the states allows for the provision of public health, safety and morals and is an

appropriate basis for legislation such as is involved here. As in Barnes, the interest served here is not the suppression of free expression but the public obscene conduct whether or not expressive activity is involved. Erotic messages or performances may be accomplished so long as the performance does not rise to the level of obscene conduct; a restriction which is no greater than that needed to meet the state's interest in protecting order and morality. As this Court noted in Barnes, the restriction "...does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic." 501 U.S. 571. The subject of this statute is the obscene exposure whether or not expressive conduct is involved and not, as Petitioners claim, nudity per se. This is a general law regulating conduct.

Petitioners also urge conflict with a number of other cases as a ground forgranting certiorari. All of the cases upon which Petitioners rely are readily distinguishable as not proscribing obscene public conduct but something short of that and are also distinguishable because the statutes or ordinances involved were not given limiting construction to preserve the constitutionality as has the statute in question here. In fact, the state court cases Petitioners urge are in conflict with this law support the judicial limitation given by the South Carolina Supreme Court in this case in an effort to preserves the constitutionality of the statute in question. Contrary to Petitioners' claims, and given the limited application of the overbreadth doctrine where a limiting construction has been employed and based on the fact that the overbreadth doctrine has been invoked

regarding a statute which addresses conduct as opposed to speech, § 16-15-365 should not be deemed substantially overbroad. See Broadrick v. Oklahoma, 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973). Nevertheless, any overbreadth which might exist should be cured through case-by-case analysis of fact specific situations to which the prohibition may not apply. Id.; New York v Ferber, 458 U.S. 747, 73 L.Ed.2d 1113, 102 S.Ct. 3348 (1982).

This is not a case in which this Court's discretionary review should be invoked.

CONCLUSION

For all of the foregoing reasons, Respondent submits that this Court should decline review of this case.

Respectfully submitted,

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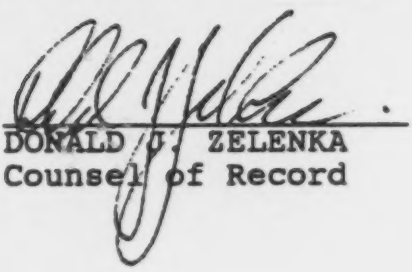
By: 
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